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IN THE CIRCUIT COURT OF BROOKE COUNTY, WEST VIRGINIA

JENNIFER BONIEY,

Plaintiff,

v.

Civil Action No. 07-C-78

BRIAN KUCHINSKI,

Defendant.

**MEMORANDUM OF OPINION AND ORDER**

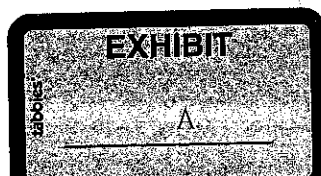
There is currently pending before this Court cross motions for summary judgment centered upon the question as to whether the exclusion of an off-road All Terrain Vehicle from uninsured motorist (UM) is enforceable, or is invalid as being in contravention of the UM Statute, WV Code §33-6-31.

After reviewing the initial memoranda of law submitted by both parties, and considering the arguments in support of those memoranda, this Court directed the parties to file supplemental memoranda of law on the sole issue of the validity of the exclusion found in the State Farm policy.

The Court has now considered the various motions, all memoranda of law, and as a result of this review and for the reasons set forth in the following Opinion, this Court has concluded that the plaintiff is entitled to Summary Judgment concluding that the attempt to exclude UM coverage for the ATV involved in the case *sub judice* violates both the letter and spirit of WV Code §33-6-31.

**OPINION**

On May 8, 2005, the plaintiff, Jennifer Boniey was injured while a passenger on an ATV owned and operated by Brian Kuchinski. At the time of the accident, Mr.



Kuchinski was insured by GEICO Insurance and Ms. Boniey was insured under two policies issued by State Farm, which contained UM coverage. Liability coverage has been denied to Mr. Kuchinski by GEICO insurance. Therefore, Ms. Boniey submitted a claim for UM coverage. However, State Farm denied UM coverage on the basis that an ATV does not qualify as an uninsured "motor vehicle" while not operated on public roads.

The UM statute W.Va. Code § 33-6-31 does not contain separate definitions of a "motor vehicle." Therefore we must look to other sections of the code for guidance. The West Virginia Legislature defines a "motor vehicle" as "every vehicle which is self propelled and every vehicle which is propelled by electric power obtained from overhead trolley wires, but not operated upon rails." W.Va. Code §17A-1-1(b). The Legislature also defines "vehicle" as "every device in, upon or by which any person or property is or may be transported or drawn upon a highway, excepting devices moved by human power or used exclusively upon stationary rails or tracks." W.Va. Code §17A-1-1(a). Furthermore, the Legislature defines an ATV as "any motor vehicle, fifty-two inches or less in width, having an unladen weight of eight hundred pounds or less, traveling on three of more low pressure tire with a seat designed to be straddled by the rider, designed for or capable of travel over unimproved terrain." W.Va. Code §17F-1-9.

The plaintiff and defendant, while using the same statutory language, differ as to whether an ATV qualifies as a "motor vehicle." However, the West Virginia Supreme Court has already held that "the definitions provided by the Legislature clearly include an all-terrain vehicle as a motor vehicle." State of West Virginia ex rel Sergeant v. Nibert, No. 33327, June 6, 2007. The only question remaining is whether the exclusion of a

motor vehicle, while not operated on public roads, from UM coverage violates the letter and spirit of the UM statute.

W.Va. Code §33-6-31(a) provides:

No policy or contract of bodily injury liability insurance, or of property damage liability insurance, covering liability arising from the ownership, maintenance or use of any motor vehicle, shall be issued or delivered in this state to the owner of such vehicle, or shall be issued or delivered by any insurer licensed in this state upon any motor vehicle for which a certificate of title has been issued by the division of motor vehicles of this state, unless it shall contain a provision insuring the named insured and any other person, **except a bailee for hire and any persons specifically excluded by any restrictive endorsement attached to the policy, responsible for the use of or using the motor vehicle with the consent, expressed or implied, of the named insured...**

It is clear from reading the UM statute that where the motor vehicle is being operated is not determinative of whether the statute and UM coverage applies. The statute makes no distinction between motor vehicles operated on public roads and highways and motor vehicles operated off public roads and highways. The statute simply applies to any motor vehicle. The only exceptions provided in the statute are: a bailee for hire and any persons specifically excluded by any restrictive endorsement attached to the policy.

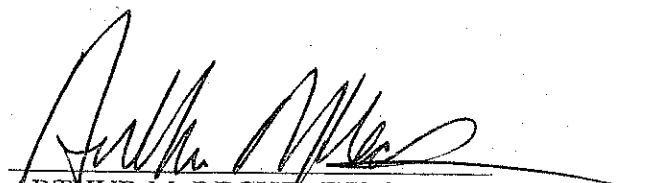
In Imgrund v. Yarborough, the West Virginia Supreme Court held, "insurers may incorporate such terms, conditions and exclusions in an automobile insurance policy as may be consistent with the premium charged, so long as any such exclusions do not conflict with the spirit and intent of the *uninsured* and *underinsured* motorists statutes." Syllabus point 2, 199 W.Va. 187 (1997). The Court further held "statutory provisions mandated by the *Uninsured Motorist Law*, *W. Va. Code* § 33-6-31 [1988] may not be altered by insurance policy exclusions." *Id.* Syllabus point 3. Therefore, an exclusion in a

motor vehicle policy that seeks to exclude an ATV, which is a motor vehicle, from UM coverage when not operated on public roads is contrary to the West Virginia UM statute.

Accordingly, the Plaintiff's Cross Motion for Summary Judgment is GRANTED.

It is so **ORDERED**.

Entered on the 14<sup>th</sup> day of September, 2007.

  
ARTHUR M. RECHT, JUDGE

A copy of this Memorandum of Opinion and Order has been sent by United States Mail to the following counsel of record:

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